BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Madera
(County File No. 11-ACP-MAD-05/06)

Docket. No. 131

DECISION

Marvin D. Horne
3678 N. Modoc Avenue
Kerman, California 93630-9517
Appellant/

Procedural Background

Under section 12999.5 of the California Food and Agricultural Code (FAC) and Title 3, section 6130 of the California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Madera CAC found that Marvin D. Horne (hereafter "appellant") violated the following regulations:

1. 3 CCR section 6622(b) by purchasing and using a pesticide for the production of an agricultural commodity without first obtaining an Operator Identification Number for Madera County;
2. 3 CCR section 6734(a)(2)[1] by failure to provide its employees extra coveralls at the decontamination site;
3. 3 CCR section 6726(b) by failure to have emergency medical care information at the work site or in the work vehicle;
4. 3 CCR section 6738(i)(7) for failure to provide his employees with protective eyewear as required by the label on the Wilbur-Ellis Dusting Sulfur;
5. 3 CCR section 6626(a) for failure to submit pesticide use reports in a timely manner;
6. 3 CCR section 6724(a) for failure to have on hand a written training program for its employees;
7. 3 CCR section 6724(f) for failure to produce documentation that appellant was certified as a Private Applicator or possessed other necessary qualification when training was conducted for his employees.

[1] In the decision, a typographical error was changed and initialed in blue ink from the incorrect site "section 6734(b)" to the correct cite "section 6734(a)(2)."

For the violation of 3 CCR section 6622(b), the hearing officer upheld the fine of $400; for the violation of 3 CCR section 6734(a)(2), the hearing officer upheld the fine of $250; for the violation of 3 CCR section 6726(b), the hearing officer upheld the fine of $250; for the violation of 3 CCR section 6738(i)(7), the hearing officer upheld the fine of $250; for the violation of 3 CCR section 6626(a), the hearing officer upheld the fine of $400; for the violation of 3 CCR section 6724(a), the hearing officer lowered the fine from the proposed $400 to $200; for the violation of 3 CCR section 6724(f), the hearing officer lowered the proposed fine from $400 to $200. The total fine amount was $1,950.

Appellant appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Department). The Director has jurisdiction in the appeal under FAC section 12999.5.

Factual Background

On June 24, 2005, Madera County Agricultural and Standards Inspector Mr. Eric Mayberry[2] conducted an inspection at the employee-identified mix-load site for the appellant's two Madera vineyards. The two vineyards were located at 28617 Avenue Five and 28798 Avenue Five in Madera County. A subsequent inspection was conducted by Mr. Mayberry on August 12, 2005, at appellant's home office. Such inspections by Mr. Mayberry ultimately resulted in Madera County's issuance of seven violations against appellant.

Appellant's Contentions

In his written argument in support of his appeal, appellant raised issues of law and contested the validity of the hearing officer's findings. These will be discussed in more detail in the analysis section. In addition, the appellant has repeated general factual allegations made but unproven at hearing, made incorrect characterizations of the law, and argued irrelevant factual assertions. These will be dealt with in this section.

Appellant argues that the Madera CAC lacked authority to issue violations numbered one through seven (see above). FAC section 12999.5 provides express authority for the Madera CAC to issue agricultural civil penalties.

Appellant argues that each "county agent" operates separately with different rules and procedures and that each county is inadequately regulated and supervised. Each of the counties follows the same statutory and regulatory scheme[3] and, upon issuing a violation, has the authority to conduct a hearing to adjudicate that matter at hand. The appeal process and right to file in superior court a writ of mandamus safeguards the appellant from abuse of discretion and allows for due process.

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[2] Mr. Mayberry at the time of the hearing was employed by Calaveras County Department of Agriculture and no longer was employed by Madera County.

[3] Division 6 and 7 of the Food and Agricultural Code and Title 3 of the California Code of Regulations.

Appellant claims that Government Code (GC) section 11445.20 applies to the hearing in both his oral arguments at the hearing and in his written submission. The California Administrative Procedures Act (APA) does not apply to the CAC hearing because the CAC is not a state agency. [4] Even if it could be considered a state agency, FAC section 12999.5 controls.

GC section 11410.20 provides that *except as otherwise provided by law* (emphasis added), the chapter (4.5 dealing with the administrative adjudication) applies to all state agencies. The authority for the commissioner to provide a civil penalty action hearing and the required procedure is found in FAC section 12999.5, thus exempting the CAC from following the APA. In addition, GC section 11415.20 sets forth that where a specific state statute conflicts with a provision of Chapter 4.5, the state statute controls. FAC section 12999.5 is the controlling statute. Lastly, GC section 11410.30 specifically exempts local agencies, such as the CAC, from the provisions of the chapter. The CAC is appointed by each county board of supervisors (FAC section 2121.)

Similarly, appellant misapplies GC section 11502, claiming that the hearing officer must be an administrative law judge. As stated above, agricultural civil penalty hearing authority resides with FAC section 12999.5. Such hearings are not subject to the APA.

Appellant states that "complainant is a rogue agent DPR has not properly supervised." There is no evidence in the record to support the appellant's statement.

Appellant argued that sulfur was a naturally occurring element, and could be used for a food supplement, miracle drug medicines, or as a fertilizer. Regardless of the other uses associated with sulfur, the foliar application of sulfur bearing an EPA pesticide registration number and registered by the Department is a pesticide and not a fertilizer, as the appellant incorrectly and continually argues in his written submission.

Appellant argued at the hearing that the registered pesticide sulfur label bears the signal word "Caution" which the appellant insisted allowed him some leeway in the use and application of sulfur as it relates to his employee's safety. However, the Wilbur-Ellis Sulfur DF label in question here bears precautionary statements relating to ingestion of the sulfur, and skin and eye contact with the sulfur.

Finally, appellant argued in his written submission that "Mr. Mayberry's testimony that he thought he smelled sulfur is unverified hearsay." Appellant is wrong. Mr. Mayberry's testimony was direct testimony of what he perceived with his senses, given under oath or affirmation, and was subject to cross-examination by the appellant; hence, Mr. Mayberry's testimony was direct evidence that was corroborated by photographic evidence, documentation (i.e., inspection report, Wilbur-Ellis purchase report), and by Mr. Mayberry's account that Mr. Maldonado identified the empty bags of sulfur as what was in the tank mix. Other contentions of the appellant will be addressed in detail below.

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[4] Only under Title 3 of the California Code of Regulations, section 6100(a)(7), is a county considered a state agency solely for the purpose of qualifying as a certified pesticide regulatory program pursuant to section 21080.5 of the Public Resources Code.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence in the record, contradicted or uncontradicted, to support the CAC's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the hearing officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the CAC's decision.

If a CAC's decision presents a matter of an interpretation of a law or regulation, the Director decides that matter using her independent judgment.

Analysis

Appellants arguments based upon issues of law or contesting the validity of the hearing officer's findings are analyzed below.

- There is substantial evidence that the appellant applied a pesticide.

Appellant argued during the hearing that his applications in Madera County on June 24, 2005, were neem oil and fish emulsion and not sulfur. However, in his submitted written argument on appeal the appellant then argued differently, and now asserts that his application was either sulfur foliar fertilizer or neem oil and fish emulsion. The record shows empty sulfur bags were found at the mix-load site by Mr. Mayberry. See Exhibit 6. The empty sulfur bags shown in Exhibit 6 were identified by appellant's employee, Mr. Tarsicio Maldonado[5], as the tank mix applied at site one. The record shows that the appellant submitted a pesticide use report showing six applications (three to site one and three to site two) between June 2, 2005 and June 24, 2005. The pesticide use report was date stamped "July 20, 2005," by Madera County. The empty sulfur bags were virtually identical to the sulfur reported by the appellant on his pesticide use report. The empty sulfur bags shown in Exhibit 6 bore an EPA registration number; hence, the sulfur was a pesticide.[6]

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[5] On the hearing record tape recording, the Madera County advocate incorrectly names Mr. Tarsicio Maldonado as "Francisco" Maldonado.

[6] Appellant's written argument cited the Department's Enforcement Letter ENF 03-14 which deals specifically with foliar sulfur applications; however, since the Enforcement letter was not introduced at the hearing, it cannot be considered.

There is information in the record that empty bags of recently purchased Wilbur-Ellis Sulfur DF, Department registration number 51036-352-AA-2935 (Exhibit 17), which bore the signal word "Caution," was found at the mix-load site on June 24, 2005. The precautionary statements section on the label stated, "Harmful if swallowed. Avoid breathing spray mist. Avoid contact with the eyes, skin and clothing." The personal protective equipment section on the label stated, "Applicators and other handlers must wear: A) Long-Sleeved shirt and Long pants; B) Chemical-resistant gloves made of any waterproof material; C) Shoes plus socks; D) Protective eyewear." The label states that on the crop "Grapes" it controls "Powdery mildew, Bud mite, Blister mite, Red spider mite, Phomopsis." Therefore, the empty bags of Wilbur-Ellis Sulfur DF found at the appellant's mix-load site on June 24, 2005, were a pesticide and not a foliar fertilizer, as the appellant alleged in his written argument.

Mr. Mayberry testified on the record that the tank mix found on June 24, 2005, smelled like sulfur and looked like sulfur. At the hearing the appellant tendered Exhibit Z, which was fish emulsion. During the hearing, the appellant asked Mr. Mayberry to smell the mixture in Exhibit Z. There is information in the record that Mr. Mayberry testified that Exhibit Z did not smell like the tank mix he smelled on June 24, 2005.

The appellant argues that the hearing officer ignored direct testimony regarding the application on June 24, 2005. There is evidence in the record that on June 24, 2005, Mr. Mayberry saw the application in progress at site one. At that time, Mr. Mayberry testified at the hearing that the application smelled like sulfur. Mr. Mayberry asked Mr. Maldonado what he was applying and Mr. Maldonado told Mr. Mayberry that he was applying sulfur. Mr. Mayberry asked Mr. Maldonado to take him to the mix-load area. Mr. Maldonado brought Mr. Mayberry to the area where there were empty bags of sulfur. Mr. Mayberry smelled the tank mix and ascertained it was sulfur. Mr. Mayberry personally observed the application while it was in progress, observed and smelled the actual tank mix, observed the empty bags of sulfur, and was told by Mr. Maldonado that the tank mix was sulfur. The contradictory evidence in the record consisted of the appellant's assertion that he learned in November 2005 or later that on June 24, 2005, his employees applied neem oil and fish emulsion and not sulfur. All of Mr. Mayberry's observations and collection of evidence on the day of the application outweighs against the appellant's hearsay testimony at the hearing that his employee told him five or more months later that no sulfur was applied; hence, the hearing officer did not ignore direct testimony, but rather weighed the conflicting evidence and reached her conclusion based upon the substantial evidence and testimony presented at the hearing.

- <u>There is evidence in the record to support reliance on Mr. Maldonado admissions.</u>

Appellant argued that there was communication difficulty between Mr. Maldonado and Mr. Mayberry during the June 24, 2005, inspection. There is information in the record that the appellant asked Mr. Mayberry during the hearing if Mr. Mayberry believed that Mr. Maldonado understood English sufficiently to comprehend Mr. Mayberry's questions asked during the inspection. Mr. Mayberry testified that he felt that Mr. Maldonado understood his questions. Mr. Mayberry

testified that if he felt that Mr. Maldonado did not understand his questions, he would have referred Mr. Maldonado to an English-to-Spanish question sheet, or called a Spanish-speaking inspector and conduct a three-way interview on a cellular phone. Mr. Mayberry also testified that he called Ms. Laura Horne, the wife of the appellant, to coordinate the stop work order issued the day of the incident at the site, the inference that Ms. Horne also spoke with Mr. Maldonado to clarify the issues at hand.

Appellant also argues that Mr. Mayberry "flashed his badge" and intimidated Mr. Maldonado. There is nothing in the record to support this allegation. To the contrary, there is information in the record that Mr. Mayberry showed Mr. Maldonado his business card and photo identification card.

Therefore, the record provides substantial justification for the hearing officer's reliance on Mr. Maldonado's statements the day of the incident.

- The commissioner's use of Kristen Jennings as the Hearing Officer was proper.

Appellant argues that "[t]he hearing denied [appellant] rights to equal protection and due process according to California law." Appellant argues that the Hearing Officer was incompetent, biased, and a "rubber stamp" for Madera County.

Appellant did raise the issue of hearing officer bias at the hearing. As a matter of law, the appellant has a right to a neutral and unbiased decisionmaker in an administrative adjudication concerning the levying of a fine. A neutral decisionmaker is fundamental to the due process of law. However, the mere possibility or unsubstantiated insinuation of bias will not overcome the presumption that the hearing officer discharged her public duty with integrity; that she was in fact a neutral hearing officer.[7] To prevail, the appellant must produce concrete facts that demonstrate actual bias or an unacceptable probability of bias. The insinuation based upon conjecture and speculation of bias is not sufficient.[8]

The appellant argues in support of his accusation of bias that the hearing officer was an "employee" of Madera County. This is untrue, as there is information in the record to the contrary. Ms. Jennings was hired by Madera County to serve as its hearing officer, and was not an employee. Even though Madera County is paying Ms. Jennings for her work, such relationship would not show actual bias or an unacceptable probability of bias in this case. In comparison, it would offend due process for the official who advocates for the agency in a case to also advise the decisionmaker in that same case.[9] However, one employee of an agency may act as the decisionmaker while another

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[7] *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir.1995).
[8] *Andrews v. Agricultural Labor Relations Bd.*, (1981) 28 Cal.3d 781, 792-793, 171 Cal.Rptr. 590. *See Breakzone Billiards v. City of Torrance*, 97 Cal.Rptr.2d 467 (2d Dist. 2000). *See also U.S. v. State of Oregon*, 44 F.3d 758, 772 (9th Cir.1994).
[9] *See Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2d Dist. 2003).

separately prosecutes the case.[10] The CAC or a designated, regular employee could have conducted the hearing, without thereby offending the requirements of due process in administrative adjudications established by federal and state courts. There is a greater possibility of bias, or improper influence, where the hearing officer is an employee of the agency prosecuting the case, than the practice of which the appellant complains. The fact that the Madera CAC hired
Ms. Jennings to provide hearing officer services does not itself create an unacceptable probability of bias. In fact, it is more protective of the appellant's right to a neutral hearing officer than the minimum process due to appellant in administrative adjudications under the federal and state constitutions. The procedures employed by the CAC did not violate appellant's due process right to a neutral hearing officer.

Appellant argued that the hearing officer allowed unilateral stipulations. The record indicates that the hearing officer read into the record the stipulations at the beginning of the hearing on both February 3, 2006, and again on March 3, 2006. The record shows that the hearing officer asked both parties if they agreed to the stipulations and both parties replied in the affirmative.

Appellant argued that the hearing officer allowed falsified evidence into the record and gave weight to such falsified evidence in her decision. Upon careful review of the record, there is nothing in the record to substantiate the appellant's claims. The appellant was provided with ample opportunity to cross-examine all of county's witnesses and examine the county's evidence. The appellant was provided with the opportunity to engage the witnesses and challenge their testimony and evidence. The hearing officer personally observed the demeanor of the parties to the hearing during their testimony and cross-examination, and assessing the credibility of witnesses is the province of the hearing officer.

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6622(b).

3 CCR section 6622(b) provides in relevant part, "prior to the purchase and use of pesticides for the production of an agricultural commodity, the operator of the property (or the operator's authorized representative) shall obtain an operator identification number from the commissioner of each county where pest control work will be performed. The operator shall provide each pest control business applying pesticides to such property with his or her operator identification number."

There is information in the record that the appellant did not have an operator's permit with the Madera CAC until July 20, 2005, the earliest possible date that the appellant could have legally applied pesticides. The date of the application in question was June 24, 2005. The appellant argued that since he did not apply a pesticide, he was not required to possess an operator's license.

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[10] *Withrow v. Larkin*, 421 U.S. 35 (1975); *Dept of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal.Rptr.2d 729 (4th Dist. 2002).

Between March 29, 2005 and June 21, 2005, the appellant purchased over 1,500 pounds of sulfur DF and dusting sulfur from Wilbur-Ellis at their facility in Helm, Fresno County. See Exhibit 10. There is information in the record that the appellant purchased 900 pounds of the Wilbur-Ellis sulfur product on June 21, 2005, three days prior to the inspection. The June 24, 2005, inspection at the appellant's mix-load site found that the tank mix was Wilbur-Ellis Sulfur DF, EPA registration number 51036-352-2935. The signal word on the Sulfur DF was "Caution." See Exhibits 4, 5, 6, 10, 17, and 18. The empty bags of sulfur were identical to the sulfur product purchased three days earlier by the appellant, and were the empty bags identified by Mr. Maldonado as the tank mix being applied to site one to Mr. Mayberry. Mr. Mayberry personally observed the tank mix and smelled the tank mix. He believed it to be sulfur. Mr. Mayberry photographed the empty bags of the Wilbur-Ellis sulfur on June 24, 2005. See Exhibit 6. Therefore, there is substantial evidence in the record that the appellant applied a pesticide without an Operator Identification Number in violation of 3 CCR section 6622(b).

Of note, the appellant argued in his written submission that his application of sulfur was a foliar application; hence a fertilizer and not a pesticide; however, the appellant also argued during the hearing that the application on June 24, 2005, was not sulfur but neem oil and fish emulsion. See appellant's Exhibit Z. The appellant testified during the hearing that he found out sometime after from his employee that the application on June 24, 2005, was not sulfur. The appellant tendered pesticide use reports for 2002-2005 to the Madera CAC in July and August 2005.[11]

It was in the province of the hearing officer to assign the weight due the appellant's arguments in the face of the conflicting testimony. Substantial evidence supports the finding that appellant violated 3 CCR section 6622(b).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6734(a)(2).

3 CCR section 6734(a)(2) provides in relevant part, "The employer shall assure that . . . . [o]ne clean change of coveralls shall be available at each decontamination site." There is information in the record that on June 24, 2005, Mr. Mayberry asked Mr. Maldonado if he had a pair of overalls and Mr. Maldonado said, "No." Mr. Mayberry noted the violation on the Pesticide Use Monitoring Inspection (form number PR-ENF-104) in box number 16, indicating noncompliance. Mr. Mayberry also noted the lack of extra coveralls at the decontamination site in the "Remarks" section of the form near the bottom of the page. See Exhibit 5.

Appellant argued at the hearing and in his written submission that Mr. Mayberry did not inspect the personal vehicle of Mr. Maldonado. Mr. Maldonado testified during the hearing that the coveralls were in his personal vehicle; however, the appellant's employee testified several months after the fact. At the time of the inspection, Mr. Maldonado told Mr. Mayberry that he did not have coveralls.

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[11] The submitted pesticide report for June 24, 2005, shows 120 pounds of Wilbur-Ellis Sulfur DF, EPA registration number 769-61-2935, in 30 pound bags (see Exhibit 9); however, Exhibit 10 shows that the appellant purchased Wilbur-Ellis DF in 30 pound bags bearing the EPA registration number 51036-352-AA-2935.

The hearing officer's province is to weigh the credibility of witnesses to resolve conflicts in the testimony. The hearing officer apparently found Mr. Maldonado's statements at the time of the incident more credible that his testimony at the hearing. Substantial evidence supports the finding that appellant violated 3 CCR section 6734(a)(2).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6726(b).

3 CCR section 6726(b) provides, "Employees shall be informed of the name and location of a facility where emergency medical care is available. The employer shall post in a prominent place at the work site, or work vehicle if there is no designated work site, the name, address and telephone number of a facility able to provide emergency medical care whenever employees will be handling pesticides and, if the identified facility is not reasonably accessible from that work location, procedures to be followed to obtain emergency medical care."

There is information in the record that Mr. Mayberry asked Mr. Maldonado if he had emergency medical care information, and Mr. Maldonado told Mr. Mayberry, "No." Appellant argued at the hearing and in his written submission that Mr. Mayberry did not inspect the personal vehicle of Mr. Maldonado. Mr. Maldonado testified during the hearing that the emergency medical care information was in his personal vehicle; however, the appellant's employee testified to several months after the fact. At the hearing the appellant submitted photos of the toilet facility. Appellant alleged that all of the requisite postings were on/in the toilet; however the photograph did not show the requisite posted information. See Exhibit D. The appellant also entered into evidence Mr. Maldonado's binder that contained the emergency medical care information that he alleged was in Mr. Maldonado's personal vehicle. See Exhibit N. However, at the time of the inspection, Mr. Maldonado told Mr. Mayberry that he did not have emergency medical care information.

The hearing officer apparently found Mr. Maldonado's statements at the time of the incident more credible that his testimony at the hearing. The hearing officer also considered the additional evidence and testimony presented by the appellant. Thus, substantial evidence supports the finding that appellant violated 3 CCR section 6726(b).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6738(i)(7).

3 CCR section 6738(i)(7) provides, "The following exceptions and substitutions to personal protective equipment required by pesticide product labeling or regulations are permitted: Persons working in an enclosed cab, as specified in (5) and (6), other than an aircraft, shall have all personal protective equipment required by pesticide product labeling immediately available and stored in a chemical resistant container, such as a plastic bag. Labeling-required personal protective equipment shall be worn if it is necessary to work outside the cab and contact pesticide treated surfaces in the treated area. Once personal protective equipment is worn in the treated area, it shall be removed and stored in a chemical resistant container, such as a plastic bag, before reentering the cab."

There is information in the record that when Mr. Mayberry asked Mr. Maldonado if he had safety glasses Mr. Maldonado said, "No." Appellant argued at the hearing and in his written submittal that Mr. Maldonado had glasses and that Mr. Mayberry just didn't see the glasses. The appellant went so far as to allege that Mr. Maldonado actually had on safety glasses when Mr. Mayberry first stopped Mr. Maldonado while operating the blast spray rig, but there is no information in the record to substantiate this allegation. Appellant offered photographs allegedly depicting safety glasses in the cab of the tractor, but appellant admitted that the photographs were not taken on June 24, 2005, but many months later. See Exhibit D. Appellant entered into evidence safety glasses and alleged that they were either in the cab of the tractor, or in Mr. Maldonado's personal vehicle, it is not clear where. See Exhibit I. Appellant argued that Mr. Maldonado did not understand Mr. Mayberry's questions. There is evidence in the record that Mr. Mayberry asked the question regarding safety glasses in Spanish. On June 24, 2005, Mr. Maldonado told Mr. Mayberry that he did not have safety glasses.

The hearing officer apparently found Mr. Maldonado's statements at the time of the incident more credible than his testimony at the hearing or the additional evidence and testimony presented by the appellant. Thus, substantial evidence supports the finding that appellant violated 3 CCR section 6738(i)(7).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6626(a).

3 CCR section 6626(a) provides, "(a) The operator of the property which is producing an agricultural commodity shall report the use of pesticides applied to the crop, commodity, or site to the commissioner of the county in which the pest control was performed. This report shall be hand-delivered or mailed, by the 10th day of the month following the month in which the work was performed. This report is not required if the pesticide use is reported to the commissioner by an agricultural pest control business as specified in subsection (b); however, the operator of the property treated, shall retain a copy of the business' "Report by Site" for two years."

There is information in the record that Madera County did not have on file any pesticide use reports from the appellant. On July 20, 2005, and again on August 12, 2005, the appellant filed pesticide use reports for sites one and two. Such reports all showed applications of sulfur and indicated EPA or Department registration numbers. Appellant argued that Mr. Mayberry somehow convinced him to submit the pesticide use reports in arrears and that Mr. Mayberry made a tacit guarantee that no action would result for such filing. There is nothing in the record to support the appellant's allegation. The appellant argued that he did not have any control over sites one and two in the years 2000 through 2004, and that he only submitted the pesticide use reports for organic certification; however, there was no evidence in the record to support the appellant's assertion that he had no control over sites one and two. Appellant argued in his written submission that "Eric Mayberry testified he personally falsified use reports for 2002-2004 he obtained as a history of the vineyards." The appellant testified that he only submitted the pesticide use reports for 2000 through 2004 to give a history of the land to certify that he was organic, but offered no other explanation why he submitted the 2000-2004 reports. There is nothing in the record to support appellant's allegation that Mr. Mayberry falsified use reports.

The hearing officer apparently found the county's records (see Exhibit 9) more credible than appellant's testimony at the hearing. Thus, substantial evidence supports the finding that appellant violated 3 CCR section 6626(a).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6724(a).

3 CCR section 6724(a) provides, "The employer shall assure that employees who handle pesticides have been trained pursuant to the requirements of this Section and that all other provisions of this Section have been complied with for employees who handle pesticides. (a) The employer shall have a written training program. The training program shall describe the materials (e.g., study guides, pamphlets, pesticide product labeling, Pesticide Safety Information Series leaflets, Material Safety Data Sheets, slides, video tapes) and information that will be provided and used to train his or her employees and identify the person or firm that will provide the training. The training program shall address each of the subjects specified in subsection (b) that is applicable to the specific pesticide handling situation. The employer shall maintain a copy of the training program while in use and for two years after use, at a central location at the workplace."

There is information in the record that Mr. Mayberry asked the appellant for his training documents during his August 12, 2005, follow-up inspection at the appellant's home-office. Appellant, at that time, told Mr. Mayberry that he had his safety program manual "somewhere" but did not produce the manual to Mr. Mayberry. At the hearing, appellant argued that on the August 12, 2005, Mr. Mayberry lead the appellant to believe that no action would occur and that it was not significant that the appellant could not produce his training program binder. Mr. Mayberry testified that he asked appellant a list of questions, and if the appellant did not have the documents or information available, Mr. Mayberry would move on to the next question. At the hearing, appellant entered into evidence his training binder. See Exhibit N. However, when Mr. Mayberry asked the appellant for his training manual on August 12, 2005, appellant could not produce his safety program manual.

The hearing officer apparently found appellant's statements at the time of the incident more credible that his testimony at the hearing. Thus, substantial evidence supports the finding that appellant violated 3 CCR section 6724(a).

- Substantial evidence supports the conclusion that appellant violated 3 CCR section 6724(f)

3 CCR section 6724(f) provides, "(f) The person conducting the training for employees who will be handling pesticides for the commercial or research production of an agricultural plant commodity shall be qualified as one of the following: (1) A California certified commercial applicator; (2) A California certified private applicator; (3) A person holding a valid County Biologist License in Pesticide Regulation or Investigation and Environmental Monitoring issued by the Department of Food and Agriculture; (4) A farm advisor employed by the University of California Extension Office; (5) A person who has completed an "instructor trainer" program presented by one of the following: (A) the

University of California, Integrated Pest Management Program after January 1, 1993; or (B) other instructor training program approved by the Director; (6) A California licensed Agricultural Pest Control Adviser; (7) A California Registered Professional Forester; or (8) Other trainer qualification approved by the Director."

There is information in the record that the appellant admitted that he did not possess the qualifications listed in section 6724(f). On August 12, 2004, the appellant told Mr. Mayberry that he conducted the training for his employees. At the hearing, appellant objected to Mr. Mayberry's testimony, stating that Mr. Mayberry never asked him who trained. At the hearing, appellant entered into evidence a photocopy of Mr. Neil Donovan's certified private applicator card issued by the Department and stated on the record that Mr. Donovan supervised and conducted appellant's pesticide training. Mr. Mayberry agreed that Mr. Donovan would qualify and meet the requirements set forth in 3 CCR section 6724(f). However, Mr. Mayberry testified that he was not told by the appellant of Mr. Donovan until the hearing. Appellant argued that Mr. Mayberry never asked him who conducted his pesticide safety training. Mr. Donovan did not testify at the hearing, nor did anyone testify that they received training from him. However, on August 12, 2004, there is information in the record that the appellant told Mr. Mayberry that he conducted the training and said nothing about Mr. Donovan.

The hearing officer apparently found appellant's statements at the time of the incident more credible that his testimony at the hearing. Thus, substantial evidence supports the finding that appellant violated 3 CCR section 6724(f).

- <u>The fine levied is appropriate.</u>

When levying a fine pursuant to FAC section 12999.5, CACs shall levy a fine between $250 and $1,000 for Class B violations, violations which posed a reasonable possibility of creating a health or environmental effect or violations that are repeat Class C violations. CACs shall levy a fine between $50 and $400 for violations that are Class C, violations that are not defined in either Class A or Class B. See 3 CCR section 6130.

For violation one, appellant was charged and fined $400 for a Class B violation of 3 CCR section 6622(b) by purchasing and using a pesticide for the production of an agricultural commodity without first obtaining an Operator Identification Number for Madera County. Appellant entered into evidence Exhibit R, a document showing average fines charged by various counties since November 2003. The fine range for Class B levied pursuant to 3 CCR section 6130 was increased on May 26, 2004, with the top fine raised from $400 to $1,000 as noted by the hearing officer. Appellant argued several irrelevant issues about notice, paperwork reduction act, and that he had a Operator Identification Number in Fresno County. Appellant was charged and fined $400 for a Class B violation. The hearing officer upheld the fine of $400. The fine is appropriate.

For violation two, the appellant was charged and fined $250 for a Class B violation of 3 CCR section 6734(a)(2) by failing to provide its employees extra coveralls and single use towels at the decontamination site. The fine levied by Madera County was at the lowest end of the Class B range. The fine is appropriate.

For violation three, the appellant was charged and fined $250 for a Class B violation of 3 CCR section 6726(b) by failing to have emergency medical care information at the work site or in the work vehicle. The fine levied by Madera County was at the lowest end of the Class B range. The fine is appropriate.

For violation four, appellant was charged and fined $250 for a Class B violation of 3 CCR section 6738(i)(7) by failing to provide his employees with protective eyewear as required by the label on the Wilbur-Ellis Dusting Sulfur. The fine levied by Madera County was at the lowest end of the Class B range. The fine is appropriate.

For violation five, appellant was charged and fined the highest fine of $400 for a Class C violation of 3 CCR section 6626(a) for failure to submit pesticide use reports in a timely manner. Appellant submitted five years of pesticide use reports in arrears; hence, the fine is appropriate.

For violation six, appellant was originally charged and fined the highest fine of $400 for a Class C violation of 3 CCR section 6724(a) for failure to have on hand a written training program for its employees. The hearing officer reduced the proposed fine from $400 to $200; hence, the fine is appropriate.

For violation seven, appellant was originally charged and fined the highest fine of $400 for a Class C violation of 3 CCR section 6724(f) for failure to produce documentation that appellant was certified as a Private Applicator or possessed other necessary qualification when training was conducted for his employees. The hearing officer reduced the proposed fine from $400 to $200; hence, the fine is appropriate.

Conclusion

The record shows the CAC's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The CAC's decision is affirmed. The CAC shall notify the appellant how and when to pay the $1,950 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

Dated: 4 August 2006

By: Mary-Ann Warmerdam

Mary-Ann Warmerdam, Director
Department of Pesticide Regulation